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BY FEDERAL EXPRESS

Hon. Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington D.C. 20423

November 22, 2002



ENTERED
Office of Proceedings
NOV 25 2002

Re: **Finance Docket No. 34281:** LB Railco, Notice of Exemption pursuant to
49 C.F.R. §1150.42 (filed November 18, 2002)

Motion By Town of Millbury To Stay Effectiveness of Notice of Exemption of LB Railco

Dear Members of the Surface Transportation Board:

The undersigned is legal counsel for the Town of Millbury, Massachusetts ("Millbury" or the "Town"), the municipality in which the facility referenced in the above filing is proposed to be located and operated. Millbury hereby requests that the Surface Transportation Board ("STB") stay the effectiveness of the Notice of Exemption that L.B. Railco, Inc. ("LB Railco") has filed. Ostensibly, LB Railco's filing concerns the leasing of rail tracks and adjacent lands, and interchange agreements with rail carriers for the movement of LB Railco's cars and equipment. What is in fact proposed by LB Railco is the construction of a solid-waste transfer facility (the "Facility") involving truck transport of mixed construction debris and municipal waste to the site of the Facility and subsequent loading onto rail cars for movement to, and disposal at, undisclosed locations. The rail transportation aspect of this proposal is ancillary and subordinate to its dominant purpose, which is to establish and conduct a solid waste handling operation free of the comprehensive regulatory schemes established by the State of Massachusetts and the Town of Millbury for the protection of wetlands and the siting of solid waste operations.

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The Notice of Exemption should not be allowed to go into effect, because it fails to comply with STB's own filing requirements pertaining to environmental reporting and assessment. Allowing LB Railco to commence operations (as it proposes to do within a matter of days) without having first engaged in the environmental review mandated by 49 CFR Part 1105 (the "Environmental Regulations") would render those Regulations a nullity. The Environmental Regulations require that the Notice of Exemption be accompanied by a substantive environmental review that is based on, and refers to, contacts and consultations with affected and interested public entities. The skimpy and self-serving discussion of environmental issues in the Notice of Exemption is insufficient in content, and is procedurally defective, because it was prepared unilaterally without input or comment from affected parties, including Millbury. A stay is required to prevent LB Railco from putting its facility into operation without first satisfying STB's reporting requirements.

Millbury is preparing, and will file within 14 days, a separate Petition to Revoke the Notice of Exemption. Millbury's Petition will be accompanied by an environmental analysis prepared by an engineering consultant who has been engaged by Millbury to review the project. That analysis will demonstrate to the STB that LB Railco's proposal, in its present form, disregards significant negative environmental impacts and fails to consider reasonable alternatives. Millbury expects that other interested State, Federal, and private entities will also be filing comments upon, and/or objections to, the Notice of Exemption.

As illustrations of the inadequacy and disingenuousness of LB Railco's filing, and in anticipation of a fuller presentation of the issues in its forthcoming Petition to Revoke the Notice of Exemption, Millbury offers the following summary comments on the filing:

1. It is undisputed that the filing of a Notice of Exemption is a request for STB "action" and therefore is subject to the environmental review requirements of 49 CFR Part 1150. LB Railco itself addresses environmental impacts within its Notice of Exemption, albeit in cursory and conclusory fashion.

2. The Notice of Exemption does not contain any attachment or subpart labeled as an Environmental Report. Millbury and any other party examining the Notice of Exemption cannot determine whether LB Railco (i) takes the position that no Environmental Report is required, or (ii) intends that the discussion of environmental impacts in the Notice of Exemption suffices to meet the requirement for an Environmental Report.

3. The Notice of Exemption does not offer sufficient detail for the STB to determine what level of environmental review is required under the STB Regulations. From limited information describing the proposed operation contained in a separate document previously made available to Millbury by LB Railco, Millbury believes that the operation of the Facility will

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exceed the threshold levels set forth in 49 CFR §§1105.6 and 1105.7 for the filing of an Environmental Report and the preparation of an Environmental Assessment. In particular, the volume of projected additional truck traffic (66 vehicles per day) exceeds the threshold level in §1105.7(e)(5)(i)(C). The information provided by LB Railco is insufficient to determine whether the Facility would exceed other thresholds for increases in rail yard activity and train traffic from current activity levels.

4. If it is intended to serve as an Environmental Report, the discussion of environmental impacts in the Notice of Exemption fails to include the items required in 49 CFR §1105.7(e). Among these items, those clearly implicated by the Facility include: (i) a description of the proposed action and reasonable alternatives, (ii) an assessment as to whether the proposal is consistent with local and regional land use plans, based on consultation with planning agencies, (iii) anticipated effect on air emissions and from rail and truck traffic, and on the State Implementation Plan under the Clean Air Act, (iv) increases in noise levels, (v) effects on public health and safety, (vi) identification of any hazardous materials to be transported, (vii) effects on critical biological habitats, (viii) effects on national and state parks, (ix) description of any inconsistency with applicable water quality standards, based on consultation with state officials, and (x) proposed actions to mitigate adverse environmental impacts.

5. Millbury disputes LB Railco's assertions that the Facility complies with municipal and state zoning and wetlands protection regulations. LB Railco's statement that the Facility "complies with applicable state and local regulatory schemes other than licensing and/or permitting" (emphasis added) is nonsensical. A project that cannot obtain required licenses and permits obviously fails to comply with the regulatory scheme that imposes the permitting requirement.

6. LB Railco's statement, quoted in the preceding paragraph, hints at what is really the case: the Facility, as proposed, violates municipal and State regulations for wetlands protection and solid waste facility siting and cannot obtain the permits required pursuant to those regulations. LB Railco is a rail carrier in only the most tenuous sense: it is in reality a waste disposal company that is under the same corporate umbrella as Waste Solutions Group, which operates and manages landfills and other waste processing facilities. Merely because it provides horizontal integration of its waste processing and transport operations, LB Railco seeks to evade state and municipal statutes and by-laws that apply to all similar facilities.

7. The Notice of Exemption makes no reference whatsoever to the fact that the Facility will be located within the Blackstone River Valley National Heritage Corridor. Under the Federal statute that created the Corridor and its supervisory Commission, the Facility proposal is subject to review by the Department of the Interior and the Commission that oversees the Corridor, and the STB is required to consult with those entities with the objective of

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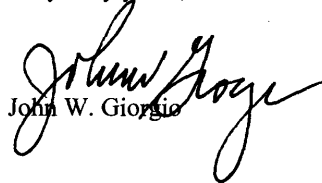
minimizing any adverse impacts on the Corridor. See P.L. No. 99-647, §9. The STB can hardly be expected to engage in meaningful discussion as to mitigating the impacts on the Corridor without a prior assessment of those impacts. The STB should comply with these consultation requirements before the Facility commences operations, not afterwards.

8. Millbury denies that LB Railco has engaged in any meaningful negotiations, discussions, or consultations with the Town. LB Railco has announced to the Town (and other entities) what it intends to do and how it will do it, and made clear that while it will entertain suggestions or requests, it is under no obligation to accede to them. This posture is incompatible with the expectation established by the Environmental Regulations that an applicant for STB action will engage in a good-faith effort to explore reasonable alternatives and mitigate adverse impacts to the extent possible.

For the foregoing reasons, Millbury respectfully requests that the STB stay the effectiveness of LB Railco's Notice of Exemption for its proposed operations in Millbury, pending the submission by LB Railco and/or the performance by the STB of a full and adequate environmental assessment of the proposed Facility. As noted above, Millbury will shortly submit a separate Petition to Revoke the Notice of Exemption, and will as an adjunct to that motion submit an environmental assessment prepared on its behalf by a technical consultant, which will examine the issues raised above, and others, in more detail.

In accordance with STB requirements, the original of this document and ten copies are submitted herewith, and a copy is being served upon the representative for the applicant.

Very truly yours,


John W. Giorgio

JWG/JJG/bp

cc: Senator Edward M. Kennedy
Senator John Kerry
Representative Richard E. Neal
Representative Jim McGovern
Ms. Mary Jude Pigsley, DEP Central Region
Blackstone River Valley National Heritage Corridor Commission
Town Manager
Mr. Bruce Haskell, CDM
Mr. John F. McHugh, Esq.

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